

RENDERED: March 11, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000349-MR

COREY JOHNSON

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
INDICTMENT NOS. 99-CR-001999,  
99-CR-002220, AND OO-CR-001313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: As we directed on remand in an unpublished opinion in Johnson v. Commonwealth,<sup>1</sup> the circuit court conducted an evidentiary hearing in Corey L. Johnson's pending RCr<sup>2</sup> 11.42 motion on the limited issue of whether defense counsel discussed a potential extreme emotional disturbance (EED) defense with

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<sup>1</sup> 2002-CA-000384-MR, rendered March 28, 2003.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

Johnson before his guilty plea and whether any actual prejudice occurred should defense counsel's performance be deemed deficient. In the order that followed, the circuit court denied Johnson's motion for RCr 11.42 relief, finding that defense counsel had indeed discussed an EED defense with Johnson before the guilty plea and that there was no evidence that defense counsel's performance was deficient. Johnson has appealed from that ruling. We affirm.

On September 12, 2000, Johnson entered an Alford plea to second-degree assault, first-degree escape, resisting arrest, tampering with physical evidence, and being a second-degree persistent felony offender. He was sentenced to a maximum of 13 years' imprisonment. Less than eight months later, he filed an RCr 11.42 motion to vacate the sentence based on ineffective assistance of counsel, lack of evidence, and double jeopardy. The circuit court denied the motion without a hearing, stating that the guilty plea colloquy established that Johnson had not been prejudiced by counsel's representation.

On appeal, we affirmed the circuit court's denial of relief on numerous ineffective assistance of counsel issues surrounding the guilty plea. But we vacated the dismissal order and remanded the case to the circuit court for an evidentiary hearing on a single issue. We held that "an evidentiary hearing is necessary to provide further information on counsel's

performance, *i.e.*, whether he discussed a potential extreme emotional disturbance defense with Johnson and counsel's handling of this issue, and any actual prejudice should defense counsel's performance be deemed deficient."<sup>3</sup>

On remand, the circuit court conducted the evidentiary hearing as directed. It consisted of testimony from Johnson's defense counsel at the time of the plea, Edward Koziboski; from Johnson himself; and from the arresting police officer, William Hutchinson.

Contrary to the allegations made in Johnson's motion that Koziboski never advised him about the EED defense, the circuit court found that Johnson admitted twice in testimony during the evidentiary hearing that Koziboski discussed the EED defense with him before the guilty plea. According to Johnson, Koziboski ruled out EED as a viable trial defense.

Koziboski testified that he did not remember the specific details of his defense of Johnson. But he also testified that he was familiar with the penalty ranges of the crimes to which Johnson pled guilty; and at the time of his defense of Johnson, he was familiar with the defense of EED and had had cases where it was used as a defense. Koziboski also testified that it was his practice to have detailed discussions with clients about the facts of the case and that his knowledge

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<sup>3</sup> Johnson v. Commonwealth, *supra*.

of the facts was based on what the clients told him, on independent investigation, and on discovery. He based his trial strategy and ultimate recommendation to Johnson to plead based on the facts as he knew them to be.

The order also recited the following version of the facts from Hutchinson:

He testified as he was driving on Interstate 65 traveling, he noticed a motorcycle entering the highway from an on ramp. Hutchinson testified the motorcycle had increased to a speed of approximately 110 mph. He stopped the motorcycle and got out of the car and proceeded to question the driver (Johnson). Hutchinson asked Johnson if he had a motorcycle license. Johnson stated he did not and Hutchinson placed him under arrest. Hutchinson placed one handcuff on Johnson. Johnson then refused to give him his other hand. Hutchinson placed him under a wrist lock and radioed for help. Hutchinson continued to negotiate with him and Johnson continued to attempt to break free. Hutchinson then sprayed Johnson in the face with mace. Although initially the mace had no effect Johnson fell on the ground. Hutchinson loosened his hold on Johnson who broke free and returned to his motorcycle. Hutchinson ran to the motorcycle and sprayed him a second time with mace. Hutchinson pushed the motorcycle, knocking Johnson and the motorcycle down. Johnson got up and reached toward a black pouch on the motorcycle. Hutchinson walked over to him and testified the next thing he remembered was his face was bleeding and he was sitting in his police car talking on the radio. Hutchinson stated he did not use any racial slurs during the incident. Hutchinson stated the injuries he sustained from the incident were that both of his eyes were black, his nose

was shattered and his cheekbone was fractured. He testified he was on leave for approximately two months while he recovered from his injuries.

The trial court found that Johnson had failed to sustain his burden of deficient performance by Koziboski in advising him to plead guilty. We agree.

The test for proving ineffective assistance of counsel is set out in Strickland v. Washington.<sup>4</sup> The Strickland test requires the movant to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense.<sup>5</sup> The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel.<sup>6</sup> The movant must further show the attorney's performance was deficient, and the attorney's ineffective performance affected the outcome of the plea process.<sup>7</sup>

Regarding the first prong of the Strickland test, the burden is on the movant to overcome a strong presumption that counsel's assistance was not constitutionally deficient or that under the circumstances counsel's actions might be considered

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<sup>4</sup> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

<sup>5</sup> *Id.* at 687, accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

<sup>6</sup> See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203, 210 (1985).

<sup>7</sup> See *id.*

"trial strategy."<sup>8</sup> A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.<sup>9</sup> In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.<sup>10</sup>

First, like the circuit court, we consider it important that Johnson admitted at the hearing that the facts concerning discussion of the defense of EED were not as he alleged them to be in his RCr 11.42 motion. By his own admission, Johnson stated that Koziboski did discuss and dismiss the viability of the EED defense two days before the guilty plea. Second, advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel.<sup>11</sup> In these circumstances, because of the anticipated damaging testimony by Officer Hutchinson and because of the very favorable overall terms of the Commonwealth's plea offer, we cannot say that it was outside the wide range of prevailing

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<sup>8</sup> Strickland, supra at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998).

<sup>9</sup> Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

<sup>10</sup> Strickland, supra at 688-89; Harper, supra.

<sup>11</sup> Beecham v. Commonwealth, 657 S.W.2d 234, 236-237 (Ky. 1983).

professional norms for Koziboski to advise Johnson to plead guilty to the amended charges. Certainly, there was not evidence introduced at the hearing to suggest that Koziboski's performance as counsel was deficient. Because it is the law of the case, our review of this case is limited to the issues discussed in this opinion. All other issues raised by Johnson are not preserved for appellate review.

For the reasons stated in this opinion, the circuit court's order denying Johnson's RCr 11.42 motion is affirmed.

ALL CONCUR.

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